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CASE NO._____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

GARY AND TERESA HIBBS,

Petitioners,

v.

THE JEEP CORPORATION,

Respondent.

PETITION OF GARY AND TERESA HIBBS FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

C. DAVID WHIPPLE
(Counsel of Record)
WHIPPLE & KRAFT, P.C.
200 Gate City Bank Bldg.
1111 Grand Avenue
Kansas City, MO 64106
(816) 842-6411
ATTORNEY FOR PETITIONERS
GARY AND TERESA HIBBS

QUESTIONS PRESENTED FOR REVIEW

1. Whether the complete denial of attorney fees to a prevailing plaintiff under 15 U.S.C. §2310 violates the Congressional intent and mandate expressed in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act?

2. Whether a prevailing plaintiff in an action under §2310 of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §2301 et seq., is presumptively entitled to an award of reasonable attorney fees, absent evidence that such award would be inappropriate?

3. Whether 15 U.S.C. §2310 of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act requires a court which denies an award of attorney fees to a prevailing plaintiff to make a written discussion of its reasons for denying such

fees?

4. Whether it is an abuse of discretion for a court to totally deny an award of attorney fees to a prevailing plaintiff, as opposed to awarding at least partial attorney fees commensurate with the time spent and actual success achieved by the plaintiff?

5. Whether it was an abuse of discretion for the Missouri Court of Appeals, Western District, to deny attorney fees for the Petitioners' appeal, especially where Petitioners were the prevailing party on the issue of liability and were cross-appellants?

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PETITION OF GARY AND TERESA HIBBS FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

Gary L. Hibbs and Teresa Hibbs, Petitioners herein, pray that a Writ of Certiorari be issued to review the decision of the Missouri Court of Appeals,

Western District, entered in this case on January 3, 1984, and the Order of the Supreme Court of Missouri denying transfer entered April 16, 1984.

OPINION AND ORDERS BELOW

The Order of the Circuit Court of Clay County, Missouri Case No. CV179-815CC, entered September 23, 1982, is not reported but is reproduced herein as Appendix A. The opinion of the Missouri Court of Appeals, Western District, Case No. WD-34191, entered January 3, 1984, has not yet been officially reported. The opinion delivered by the Court of Appeals is reproduced and attached as Appendix B to this Petition. The Order of the Missouri Court of Appeals, Western District, in Case No. WD-34191, entered February 28, 1984, overruling a motion for rehearing and denying transfer to the Supreme Court of Missouri is not reported

and is reproduced herein as Appendix C. The Order of the Missouri Supreme Court in Case No. 65820, entered April 16, 1984, denying application for transfer to that court is not reported and is reproduced herein as Appendix D.

JURISDICTION

The Order of the Missouri Supreme Court denying Petitioners' Application to Transfer their case from the Missouri Court of Appeals to the Missouri Supreme Court was entered on April 16, 1984. (App.D) At that time the January 3, 1984, decision of the Missouri Court of Appeals, Western District, (App.B) became final and Petitioners' avenues of review in the State Courts were exhausted. Because the Supreme Court of Missouri declined to accept Petitioners' application for transfer, the Missouri Court of Appeals, Western District, is the highest

court in which a decision could be had. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1257(3) which states:

28 U.S.C. §1257 State Courts; Appeal; Certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATUTE INVOLVED

The remedies provision of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §2301 et seq. (1982), provides that:

15 U.S.C. §2310 Civil Action by Consumer for Damages, etc.; Jurisdiction; Recovery of Cost and Expenses; Cognizable Claims.

(d)(1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief--

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commence-ment and prosecution of such action, unless the court in its discretion shall deter-mine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection-

(A) if the amount in controversy of any individual claim is less than the sum

or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in the suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

STATEMENT OF THE CASE

1. BACKGROUND AND BASIC FACTS

Gary and Teresa Hibbs purchased a 1979 Jeep Cherokee four wheel drive vehicle on August 28, 1978. The total purchase price of the vehicle was $9,210.00. The Hibbs traded in a 1975 Chevrolet for an allowance on the purchase price of $2,266.83, with the balance owed being payable by a promissory note. (App.B-3).

At the time of the purchase, the Hibbs received a Jeep limited warranty covering the vehicle which provided that Jeep,

". . . will pay for the repair or replacement of any part it supplies which proves defective in material or workmanship under normal use and service." In November, 1978, the Hibbs took the Cherokee to Rodekopf Motors in Independence, Missouri, to have its wiring harness repaired, which was done under the warranty. Rodekopf Motors, an authorized Jeep dealership, stated that the harness had been pinched by the hood. Mr. Hibbs admitted that the wiring harness problem was not related to his claim regarding the final fire. (App.B-3).

In the first week of December, 1978, there was a transmission fire in the vehicle while Mrs. Hibbs was operating it. The vehicle was towed to Rodekopf Motors which fully disassembled the transmission. Jeep's District Service Manager, J. C. Deihl, was then present and was asked to examine the transmission

fluid. He observed that it was dark grey in color and had "an odor like raw sewage." He could not determine what caused the unusual look and smell of the fluid, and gave no instructions to Rodekopf as to how to work on the transmission. It was reassembled, the repair cost was paid by Jeep under the warranty, and Mr. Hibbs obtained the vehicle on December 15, 1978, after being advised by Rodekopf that the transmission repair had been completed. (App.B-4).

On the way home, Mr. Hibbs noted that the transmission was making noise, throwing fluid out, and that there was smoke coming from the engine compartment. Mr. Hibbs called Rodekopf and told them that "their brand new transmission didn't last," and he was advised that a tow truck would be sent on December 18 to rebuild the transmission. (App. B-5).

Mr. Hibbs then asked his daughter to

move the vehicle. When she started it, the engine compartment burst into flames. Mr. Hibbs called John T. Doudna, Jeep's Owner Relations Manager, and told him that "his vehicle had quit pulling, was leaking fluid in his drive-way and he wanted to know what I was going to do about it." Doudna told Mr. Hibbs to contact the dealership and to make arrangements to have the vehicle taken back so it could be looked at. (App.B-5).

On December 19, 1978, Deihl and Doudna inspected the vehicle to determine the origin of the transmission fire. As a result of these examinations, Doudna and Deihl were unable to find any evidence of any mechanical or manufacturing defect that started the fire. Mr. Hibbs was so informed by Doudna, and it was suggested that he turn the matter over to his insurance company, which he declined. (App.B-7).

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On February 23, 1979, Mr. Hibbs' counsel notified Jeep that ". . . as of this date Mr. Gary Hibbs revokes the acceptance of said Cherokee Jeep and demands the refund of the purchase price of the vehicle. Said automobile is now in the possession of Rodekopf Dealership." The demand was rejected on the basis that there was no evidence of any defect as to the cause of the fire of December 15, 1978. (App.B-7). The filing of this lawsuit followed.

2. PROCEEDINGS BELOW IN WHICH THE FEDERAL QUESTION WAS RAISED

Petitioners' action alleged breach of express warranty and fraud, and specifically prayed for attorney fees and expenses under §2310(d) of the Magnuson-Moss Act, 15 U.S.C. §2301 et seq. (App E-1). The Petitioners at trial submitted their cause of action to the jury based upon

breach of express warranty and fraud. (App.B-2). The jury returned verdicts in favor of the Petitioners in the amount of $7,500.00 on the express warranty claim and $12,500.00 on the fraud claim. In a separate proceeding before the trial court held on August 20, 1982, Petitioners presented their arguments in support of their request for attorney fees, pursuant to §2310(d) of the

Petitioners requested the court to award them fees for the actual time expended, to-wit: 400.40 hours in attorney office time, 40 hours in attorney trial time, and 168.50 hours in law clerk time. Petitioners contended that a reasonable hourly rate for the performance of the services rendered by their attorneys was $65.00 per hour office time, $85.00 per hour trial time, and $35.00 per hour law clerk time. (App.B-26). Petitioners requested total

attorney fees of $37,524.75, (App.B-26), as well as reimburse-ment for expenses incurred of $1,754.94. (App.B-26). Petitioners' Motion for attorney fees was summarily denied by the trial judge. No reasons were given for the denial of Petitioners' attorney fees request. (App. A-2). Petitioners appealed to the Missouri Court of Appeals, Western District, alleging that the trial court erred in denying them attorney fees under the Magnuson-Moss Act. (B-23)

The Missouri Court of Appeals, Western District, reversed the award on the fraud claim. The court affirmed the Petitioners' judgment on the breach of express warranty claim; however, it remanded the issue of damages to the trial court for a new determination on the amount of damages to be awarded. Although the damage amount was remanded to the trial court, Petitioners remain

the prevailing party as to liability on the breach of warranty claim. The Court of Appeals also affirmed the trial court's denial of Petitioners' request for attorney fees. (App.B-27).

On January 17, 1984, Petitioners filed in the Missouri Court of Appeals, Western District, their Motion for Rehearing and/or For Transfer to the Missouri Supreme Court. Petitioners alleged that the decision of the Court of Appeals, Western District, violated the intent of the Magnuson-Moss Act and was in conflict with the prevailing guidelines for Federal Attorney Fee Statutes. (App.E-11). This Motion was denied by the Court of Appeals on February 28th, 1984. (App.C).

On March 12, 1984, Petitioners filed in the Missouri Supreme Court their application to transfer the case from the Court of Appeals for the Western District

to the Missouri Supreme Court. Petitioners alleged that the opinion of the Court of Appeals, Western District, was in conflict with the holdings of other jurisdictions and Federal Courts with regard to attorney fee provisions. (App.E-15). Petitioners' application was denied by the Missouri Supreme Court on April 16, 1984. (App.D). At each stage of the State Court proceedings, Petitioners asserted their rights under the Magnuson-Moss Act to recover their attorney fees. This right was asserted when the Petition was filed, (App.E-1), at the trial court level, (App.E-6), in the Appeal to the Missouri Court of Appeals, (App.E-11), and in the Petitioners' Applications to Transfer to the Missouri Supreme Court. (App. E-15). The refusal of the State Courts to recognize Petitioners' right to recover their attorney fees has led to the filing

of this petition for a Writ of Certiorari in this Court.

REASONS FOR GRANTING WRIT

In refusing to award Petitioners' attorney fees in the present case, the Missouri Courts at the trial and appellate levels have acted in violation of the intent, as well as the literal language, of the Magnuson-Moss Act. This case is a case of first impression in Missouri with regard to this application of the Magnuson-Moss attorney fees provision. As a guideline Petitioners have paralleled the Magnuson-Moss attorney fees language with the language of the Civil Rights Attorney Fee Award Act of 1976, 42 U.S.C. §1988. The Civil Rights Attorney Fee Award Act is similar in language to the Magnuson-Moss provision, and Petitioners contend that the guidelines which are applicable to the Civil

Rights Attorney Fee Award Act are also applicable to the Magnuson-Moss attorney fees award provision. Based upon these guidelines, as well as a literal reading of the Magnuson-Moss provision, it is clear that the refusal of the Missouri Courts to allow Petitioners their attorney fees in the present case should be reversed by this Court.

1. THE COMPLETE DENIAL OF ATTORNEY FEES TO A PREVAILING PLAINTIFF UNDER 15 U.S.C. §2310 VIOLATES THE CONGRESSIONAL INTENT AND MANDATE EXPRESSED IN THE MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT.

Under the attorney fees provision of the Magnuson-Moss Act, 15 U.S.C. §2310(d), a successful plaintiff is entitled to recover attorney fees. The purpose of this remedy of recovery of attorney fees is to encourage private attorneys to accept warranty cases and to make enforcement of warranty obligations more practical for consumers, as well as to open up the courts to those consumers who otherwise would not have the financial resources to pursue a warranty claim. Senate Report No. 93-151, Ninety Third Congress, First Session 24 (1973). The legislative intent of the Act is to enable consumers to have a viable method

of enforcing warranties given to them by manufacturers. Without this Act, warranties are simply empty promises and consumers are at the mercy of manufacturers.

This case is a perfect example of why the Magnuson-Moss Act was enacted. Petitioners purchased their automobile in August of 1978. Within four months of purchasing the vehicle it had caught fire three times, yet despite its written warranty, Jeep refused to repair the vehicle after the third fire. Today, more than five years later, that warranty has yet to be enforced. Defendant Jeep has thwarted every move made by Petitioners, typical of lawsuits involving a "lemon" automobile. Now, after one jury trial and numerous appellate maneuvers, Petitioners' rights have yet to be vindicated, despite the clear liability on the part of the Jeep

Corporation. The amount of attorney fees prayed for by Petitioners gives a clear answer itself as to the reason why the Magnuson-Moss Act was enacted.

Quite obviously, pursuing litigation involving a "lemon" automobile without the Magnuson-Moss Act is outside the financial resources of most consumers. The financial limitations faced by most consumers in pursuing a warranty claim were recognized by the sponsors of the Magnuson-Moss Act. In statements before Congress, Senator Magnuson and Senator Moss each extolled the necessity of the attorney fee provision in enforcing consumer warranties. Senator Magnuson, co-sponsor of the Act, on behalf of the Senate Commerce Committee submitted a report to Congress regarding the purpose of the Act which included the following statement pertaining to attorney fees:

"Because enforcement of the warranty through the Courts is prohibitively expensive, there exists no currently available remedy for consumers to enforce warranty obligations. If warrantors who did not perform as promised suffered direct economic detriment, they would have strong incentives to perform. Therefore, there is a need to ensure warrantor performance by monitarily penalizing the warrantor for nonperformance--and awarding that penalty to the consumer as compensation for his loss. One way to effectively meet this need is by providing for reasonable attorney fees and court costs to successful consumer litigants, thus making consumer resort to the courts feasible. It is hoped that by making court actions feasible, suppliers will be encouraged to develop workable and informal dispute settlement of consumer complaints." Senate Report No. 93-151, Ninety-Third Congress, First Session at Page 7-8 (1973).
(Emphasis Added)

In refusing to allow Petitioners to

recover their attorney fees in the present action, Missouri Courts have refused to recognize the Congressional mandate of the Magnuson-Moss Act. These Missouri Courts are setting a precedent which will override the Congressional intent of the Act and work a hardship upon the very consumers that the Act seeks to protect. If a plaintiff is not going to be able to recover attorney fees in his or her action against a corporation for breach of warranty, then many plaintiffs will likely not file suit or be forced to compromise their claim for an amount substantially less than what the claim is actually worth. Many plaintiffs presently contemplating a cause of action in a State Court under Magnuson-Moss will undoubtedly be discouraged in exercising their rights under the Act if there are no attorney fees guidelines other than the ones contained in the opinion ren-

dered by the Missouri Court of Appeals on January 3, 1984. The present decision in the Missouri Court of Appeals will almost surely result in a "chilling effect" on the part of consumers in exercising their warranty rights, and much of the force and effect of the Magnuson-Moss Act will be completely erased.

Under Magnuson-Moss, Congress has chosen to specifically delineate and protect the area of consumer warranty rights. Yet in their decisions the Missouri Courts in this case have failed to enforce these provisions to their fullest extent. Due to this conflict and the bearing that this case will have on consumer actions brought in Missouri State Courts, this matter of attorney fees under the Magnuson-Moss Act should be resolved by this Court. Missouri Courts should not be allowed to eviscerate the Congressionally mandated consumer protec-

tion contained within the Magnuson-Moss attorney fees provision.

2. A PREVAILING PLAINTIFF IN AN ACTION UNDER §2310 OF THE MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT, 15 U.S.C. §2301 et seq., SHOULD BE PRESUMPTIVELY ENTITLED TO AN AWARD OF REASONABLE ATTORNEY FEES, ABSENT EVIDENCE THAT SUCH AN AWARD WOULD BE INAPPROPRIATE.

In resolving this issue, the Court should look to those Magnuson-Moss cases which have been decided in other jurisdictions, as well as to guidelines followed in applying the Civil Rights Attorney Fee Award Act of 1976. The very nature of this action, within the framework of the legislative intent and statutory language of the Magnuson-Moss Act, establishes that an award of attorney fees to a prevailing plaintiff should be the rule rather than the exception.

There is no denying that the trial

court has a certain amount of discretion in awarding attorney fees under Magnuson-Moss, but that discretion cannot be applied in a vacuum. The discretion exercised by the court should vary with the circumstances before it. "That a court has discretion to do or not do an act does not mean that it has a license to decide as it pleases. The exercise of discretion is a judicial act, controlled by more or less well defined legal standards." See, B. Cardozo, The Nature of Judicial Process, p. 129 (1921).

The discretion available to the court in awarding attorney fees under Magnuson-Moss must be viewed in light of the Act's intent--that of vindicating consumer rights. If that intent is considered, it is going to be a rare and unusual case in which the court should not award attorney fees to the prevailing

plaintiff.

In applying the attorney fees provision of the Magnuson-Moss Act, Courts in other jurisdictions have almost unanimously allowed successful plaintiffs to recover their attorney fees as well as court costs and expenses. For a sampling of cases in which appellate courts of other jurisdictions have awarded attorney fees, see Welch v. Fitzgerald Hicks Dodge, Inc., 430 A.2d 144 (N.H. 1981); Volkswagen of America vs. Harrell, 431 S.2d 156 (Ala. 1983); Black v. Don Schmid Motors, 657 P.2d 517 (Kan. 1983); Volkswagen of America, Inc. v. Novack, 418 S.2d 801 (Miss. 1982); Royal Lincoln Mercury v. Wallace, 415 S.2d 1024 (Miss. 1982); Nobility Homes Inc. v. Ballantine, 386 S.2d 727 (Ala. 1980); and Sherer v. DeSalvo, 534 S.W.2d 149 (Ark.

App. 1982). Of the reported appellate decisions on the attorney fees issue under Magnuson-Moss, only two reported cases have been found in which attorney fees were totally denied to a prevailing plaintiff.[1]

The statutory language of the Magnuson-Moss Act is similar to the Civil Rights Attorney Fee Award Act of 1976, 42 U.S.C. §1988 (supp. 1979). This statute provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fee as part of the costs." Under this Act Federal Courts have consistently held that the trial court's discretion in awarding attorney fees to a prevailing party in a Civil Rights action is narrowly limited. In Bonnes v. Long, 599 F.2d 1316 (C.A. 4 1979), the Court of

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[1]Trost v. Porrecco Motors, Inc., 443 A.2d 1179 (Pa. Sup. 1982); and Petersen v. Bendix Home Systems, Inc., 318 N.W.2d 50

Appeals reversed the denial of an attorney fees award in a Civil Rights case, quoting the controlling standard from Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 19 L.Ed.2d 1263 (1968).

In Newman, this Court held that a prevailing plaintiff should ordinarily recover an attorney's fee unless, "special circumstances should render such an award unjust." This standard has been uniformly applied in Civil Rights cases. Hensley v. Eckerhart, 103 S.Ct. 1933, __ U.S.__, 76 L.Ed.2d 40 (1983); Whorton v. Knefel, 562 F.2d 550 (C.A. 8 1977); Sethy v. Alameda County

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(Minn.1982). In the Trost case, the opinion set forth absolutely no facts as to the number of hours spent by Plaintiff's attorney or any of the other facts relevant to why an award of attorneys fees was denied. In the Petersen case, Plaintiff's Motion was denied due to its untimeliness.

Water District 602 F.2d 894 (C.A. 9 1979); Mid-Hudson Legal Services, Inc. v. G&U, Inc., 578 F.2d 34 (C.A. 2 1978); Perez v. University of Puerto Rico, 600 F.2d 1 (C.A. 1 1979); Robert M. v. Benton, 671 F.2d 1104 (C.A. 8 1982); and Zolle v. Eastern Allamakee Community School District, 588 F.2d 246 (C.A. 8 1978).

The decisions concerning attorney fees in the Eighth Circuit have made it clear that "it is an abuse of discretion to deny fees entirely to any Petitioner who has crossed the prevailing party threshold." Hensley v. Eckerhart at 62, (Brennan). See, Williams v.Trans World Airlines, Inc., 650 F.2d 1267, 1274 (C.A. 8 1981); United Handicap Federation v. Andre, 622 F.2d 342 (C.A. 8 1980); and Cleverly v. Western Electric Company, 594 F.2d 638, 642 (C.A. 8 1979).

In reviewing the appellate cases

regarding the Magnuson-Moss attorney fees provision, as well as those applying the attorney fees guidelines for Civil Rights Attorney Fee Award cases, it is exceedingly clear that it is the rule rather than the exception that prevailing plaintiffs should recover their attorney fees. In refusing to award Petitioners their attorney fees in the present case, the Missouri Courts have disregarded both the statutory language of the Magnuson-Moss Act and guidelines developed by case law in this area. The Missouri Courts have failed to recognize the general rule that the failure to award attorney fees to a prevailing plaintiff is an abuse in discretion, as an attorney fees award which is so low as to frustrate the purpose of an attorney fees Act constitutes an abuse of discretion. Custom v. Quern, 482 F.Supp. 1000 (D.C. Ill. 1980) and Webb v. Aggrey, 481

F.Supp. 651 (D.C. Ohio 1979). In the present case, total denial of the attorney fees award clearly frustrates the purpose of the Magnuson-Moss attorney fees provision.

3. UNDER §2310(d) OF THE MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT, A COURT WHICH DENIES AN AWARD OF ATTORNEY FEES TO A PREVAILING PLAINTIFF IS REQUIRED TO MAKE A WRITTEN DISCUSSION OF ITS REASONS FOR DENYING SUCH FEES.

Section 2310(d) of the Act provides for the award of costs and expenses, which include attorney fees reasonably incurred "unless the court in its discretion shall determine that such an award of attorney fees would be inappropriate." This language provides the general rule that the prevailing plaintiff should be allowed attorney fees, with the exception being when the court in its discretion

"shall determine" that attorney fees would be "inappropriate." This language requires the trial court to explicitly determine when attorney fees would be inappropriate. This further supports the denial of attorney fees being the exception rather than the rule.

In the present case, the trial court simply overruled Petitioners' request for attorney fees and made no reference to any reasons as to why Petitioners were not entitled to attorney fees, or why an award of attorney fees was inappropriate. Under the language in the Act, if the trial court denies the attorney fees claimed under Magnuson-Moss to the prevailing plaintiff, the court is required to set forth its reasons which, in the exercise of its discretion, render an award of attorney fees inappropriate.

Turning to the area of the Civil Rights Attorney Fee Award Act, Courts

have traditionally held that where attorney fees are denied, the trial court must identify the "special circumstances" involved in the denial and explain why the circumstances render an award unjust. Sethy v. Alameda County Water District, supra; Bonnes v. Long, supra; Harkless v. Sweeny, Independent School District, 608 F.2d 594 (C.A. 10 1979); Freeman v. Franzen, 695 F.2d 485 (C.A. 7 1982), cert. denied, 103 S.Ct. 3553 (1983); and Mimms v. Wilson, 514 F.2d 106 (C.A. 4 1975).

In Hensley v. Eckerhart, supra, this Court recently held that when a federal attorney fee statute is involved, a trial court must clearly and concisely set out the reasons for awarding or failing to make an award of attorney fees in the case. This is specifically stated at page 53 of the opinion.

Without an opinion by the trial court

stating the reasons for denying an attorney fees award to the Petitioners, it is impossible to know if the trial court felt that such an award was inappropriate or unreasonable, or whether the trial court was under the mistaken belief that a Magnuson-Moss attorney fees award was inapplicable in a State Court. This lack of information places future Magnuson-Moss plaintiffs in the same bind that Petitioners in this case have faced in dealing with the Appellate Courts in Missouri.

Petitioners in this case have been forced to "shadow box" with the issues surrounding the denial of attorney fees throughout the appellate procedure. Since the trial court did not set forth its reasons for denying Petitioners' attorney fees, Petitioners have had to speculate as to the reasons for the denial, and thus have been precluded from

making a head-on attack against the trial court's reasoning. In considering the effect that this problem will have on future Magnuson-Moss plaintiffs, such plaintiffs will be placed at an extreme disadvantage when applying for their attorney fees awards. Without being required to state, in writing, its reasons for denying attorney fees under Magnuson-Moss, a trial court will be allowed to summarily deny fees. Such action on the part of the trial court undermines the intent of the attorney fees provision, and should not be allowed as a means to circumvent the remedial provisions of this Act.

Respondent may argue that Petitioners should have requested Findings of Fact and Conclusions of Law from the trial court. However, any such requirement under state law would be in contravention of the plain reading of the Magnuson-Moss

Act as well as other federal attorney fees statutes. In any event, the need for an interpretation of the impact of such a state requirement on federal attorney fees provisions constitutes an additional reason for this Court to grant Petitioners' request for a Writ of Certiorari.

4. UNDER THE MAGNUSON-MOSS ACT, IT IS AN ABUSE OF DISCRETION FOR A TRIAL COURT TO TOTALLY DENY AN AWARD OF ATTORNEY FEES TO A PREVAILING PLAINTIFF, AS OPPOSED TO AWARDING AT LEAST PARTIAL ATTORNEY FEES COMMENSURATE WITH THE TIME SPENT AND ACTUAL SUCCESS ACHIEVED BY THE PLAINTIFF.

Under Magnuson-Moss, where a plaintiff prevails upon at least one theory in his or her lawsuit, that plaintiff is entitled to at least a partial award of attorney fees commensurate with the actual success achieved on the merits of

the case. In the present matter, Petitioners were successful at the trial level on both the breach of warranty theory and the fraud theory. Although the fraud theory was later reversed by the Missouri Court of Appeals for the Western District, the Petitioners remained the prevailing party as to the breach of the express warranty. At the very least in this case, Petitioners should be entitled to reasonable attorney fees for the success achieved on the breach of express warranty claim.

While arguing that Petitioners are entitled to at least a partial award of attorney fees, Petitioners are not abandoning their contention that they are entitled to a full award of fees. It is important to note that under both Magnuson-Moss and the Civil Rights Attorney Fee Award Act, Courts have held that where an action consists of related

claims, a plaintiff's attorney fees award should not be reduced simply because the trial court did not adopt each contention raised by plaintiffs.

Hensley v. Eckerhart, supra;

Sherer v. DeSalvo, supra; and

Rivera v. City of Riverside, 679 F.2d 795 (C.A. 9 1982);

Seattle School District No. 1 v. Washington, 633 F.2d 1338 (C.A. 1980); Northcross v. Board of Education of the Memphis City Schools, 611 F.2d 624 (C.A. 6 1979), cert. denied, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980).

In the present case, Petitioners ultimately prevailed on one claim, that of breach of express warranty; however, the breach of express warranty claim, the fraud claim, and those other claims raised in Petitioners' petition were all related to each other in seeking to

remedy the wrongful conduct on the part of Jeep Corporation. As the time spent on each of these claims was to achieve a common goal, Petitioners contend that their entitlement to an attorney fees award should not be reduced simply based upon the fact that Petitioners did not succeed on every contention contained within their pleadings.

Petitioners contend that they are entitled to a full award of attorney fees in the present action. It is beyond dispute that Petitioners are entitled to at least a partial award of fees, which would directly reflect their success on the breach of warranty claim in this action. A total denial of fees in this case would frustrate the purpose of the Magnuson-Moss attorney fees provision. Because under the Act a prevailing party should ordinarily receive fees unless special circumstances would render an

award unjust, an award of fees so low as to frustrate the purpose of the attorney fees provision also constitutes an abuse of discretion. See, Custom v. Quern, supra; Webb v. Aggrey, supra. See also Berger, "Court Awarded Attorney Fees: What is Reasonable?", 126 U. Pa. L. Rev. 281, 306 (1977).

In the present case, Petitioners have clearly crossed the prevailing party threshold. As a result of this, according to attorney fees provision guidelines, it is an abuse of discretion to deny fees entirely to Petitioners. Hensley v. Eckerhart, supra; Williams v. Trans World Airlines, Inc., supra; United Handicap Federation v. Andre, supra; and Cleverly v. Western Electric Co., supra.

The policy interests in the present case make it clear that an award of attorney fees should have been made in

the present case. Petitioners' position is supported by the language and intent of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, the prevailing standard as to Magnuson-Moss attorney fees awards in other jurisdictions, and Federal Court attorney fees guidelines with regard to attorney fees awards under the Civil Rights Attorney Fee Award Act of 1976.

Petitioners clearly are within the class which Congress sought to protect by enacting the Magnuson-Moss legislation. By summarily rejecting Petitioners' application for attorney fees in the trial court, and by refusing to review that denial in the appellate courts, the courts of the State of Missouri have chosen to disregard this important piece of federal legislation. At the same time, these courts have deprived the Petitioners of a right specifically

created, delineated, and enacted by the Congress of the United States. At this point, the granting of this petition is the only means by which Petitioners can enforce this important federal right.

5. IT WAS AN ABUSE OF DISCRETION FOR THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT, TO DENY ATTORNEY FEES FOR THE PETITIONERS' APPEAL, ESPECIALLY WHERE PETITIONERS WERE THE PREVAILING PARTY ON THE ISSUE OF LIABILITY AND WERE CROSS-APPELLANTS.

On Petitioners' Cross Appeal, the Missouri Court of Appeals, Western District, did not address Petitioners' request for attorney fees for expenses incurred and time expended on appeal. This is true even though Petitioners were the "prevailing party" on the issue of liability at the appellate level. Such conduct on the part of the Court of Appeals constitutes an egregious refusal

by the Missouri Appellate Courts to *recognize the attorney fees provision of* the Magnuson-Moss Act. This factor demonstrates an additional, significant reason for this Court to grant a Writ of Certiorari in the present case.

On appeal to the Missouri Court of Appeals, Western District, Petitioners requested an award of attorney fees for time expended and expenses incurred in pursuing their appeal to the Missouri Court of Appeals, Western District. Due to the plain language and legislative intent of the Magnuson-Moss Act in awarding attorney fees to prevailing parties, this should include any appeals required as a result of the litigation in question. This interpretation parallels the guidelines set forth by Federal Courts with regard to an award of attorney fees for appellate expenses for Civil Rights cases.

Perkins v. Standard Oil Company of California, 399 U.S. 222 (1970); and Donnell v. General Motors Corp., 576 F.2d 1292 (C.A. 8 1978). In the present case, the Missouri Courts have refused to even comment on the issue of attorney fees with regard to the appeal or with regard to the retrial of the damage issue only. Even after the Court of Appeals reversed the judgment on the fraud count, Petitioners remained the prevailing party with regard to the breach of warranty claim. Since Petitioners still qualify as a "prevailing party" under Magnuson-Moss, Petitioners should have received an award of attorney fees for their costs incurred and time expended on the appeal, as well as a direction by the Court of Appeals to allow for attorney fees on retrial of the damage issue.

As the Missouri Courts have failed to address the issue of Petitioners' attor-

ney fees on appeal and on retrial, this Court should grant Certiorari in this case so that Petitioners may recover for the additional expense necessitated by seeking to vindicate their rights through the appellate process.

CONCLUSION

It is submitted that there are substantial and compelling reasons for granting certiorari in this case. It is crucial that this Magnuson-Moss attorney fees provision be considered and construed by this Court in light of the Missouri decisions. Otherwise, the Magnuson-Moss attorney fee provision will continue to be thwarted by the state courts.

For the foregoing reasons, Petitioners respectfully request that this petition be granted and that a Writ of Certiorari issue to review the opinion and judgment

of the Missouri Court of Appeals, Western District.

Respectfully submitted,

C. DAVID WHIPPLE

(Counsel of Record)

200 Gate City Bank Bldg
Bldg. 1111 Grand
Kansas City, MO 64106

Attorney for
Petitioners Gary
and Teresa Hibbs

July 10, 1984

CERTIFICATE OF SERVICE

I, C. DAVID WHIPPLE, a member of the Bar of the United States Supreme Court, hereby certify that 3 true copies of the Petition for Writ of Certiorari were hand delivered pursuant to Supreme Court Rule 28.3, on this 11th day of July, 1984, upon the following:

George P. Coughlin
Attorney-at-Law
GAGE & TUCKER
2345 Grand Avenue
P. O. Box 23428
Kansas City, MO 64141
Attorney for Respondent Jeep Corporation

APPENDIX A

OFFICE OF JACK K. ROBERTS
CLAY COUNTY CIRCUIT CLERK
SEVENTH JUDICIAL CIRCUIT OF MISSOURI
P. O. BOX 218
LIBERTY, MISSOURI 64068

September 23, 1982

Mr. George Coughlin
2345 Grand Avenue
P. O. Box 23428
Kansas City, MO 64141

Mr. C. David Whipple
200 Gate City Bank Bldg.
1111 Grand Avenue
Kansas City, MO 64106

Re: Hibbs, et al v. The Jeep Corp., et al.
No. 179-815 CC

You are hereby notified the court, Division Number Three made the following entry in the above mentioned cause on this 23rd day of September, 1982, to-wit:

"Plaintiff by attorney and defendant by attorney appeared and announced ready on plaintiff's motion for attorney's fees and

defendant's motion for new trial and defendant's motion N.O.V. Motion argued. Plaintiff's motion for attorney's fees is overruled and defendant's motion for new trial or motion for judgment N.O.V. overruled. Clerk to notify parties."

Acknowledgement requested.

Yours very truly,

JACK K. ROBERTS
Clay County Circuit Clerk
Seventh Judicial Circuit
of Missouri

By: /s/ Alpha Fairchild
Deputy Clerk

APPENDIX B

NOTICE

THIS OPINION IS NOT FINAL UNTIL ALL POST HANDDOWN MOTIONS HAVE BEEN DISPOSED OF AND THE MANDATE ISSUED AND RECEIVED.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

GARY L. HIBBS and THERESA HIBBS) Respondents-Appellants)		
vs.	)	No.WD 34191
	)	Opinion Filed:
	)	January 3, 1984
JEEP CORPORATION, Appellant-Respondent.)		

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY
Honorable Stephen R. Pratt, Judge

Before Clark, P.J., Pritchard and Lowenstein, JJ.

Plaintiffs submitted their case against

the Jeep Corporation for breach of an express warranty given by it in connection with the sale of a 1979 Jeep Cherokee automobile. The jury returned a verdict on the express warranty count for $7,500, and also upon the submission of a charge of a fraud in Count V in the amount of $12,500.

Plaintiffs candidly concede in their brief that the submission of the fraud claim was not supported by the evidence, notably that there was no evidence that the warranty was false, or that there was on Jeep's part a present fraudulent intent not to perform it at the time when it was given. Consequently, that part of the judgment must be set aside, and it is unnecessary to notice further Jeep's claim of error in its submission, except as to how it might bear on the breach of warranty claim.

Plaintiffs purchased the Cherokee on August 28, 1978, for a total of $9,210, trading in a 1975 Chevrolet for an

allowance on the purchase price of $2,266.83. The balance was payable by promissory note secured by a security agreement given by Pete Franklin Chrysler, which note was assigned by it to the Bank of Independence. Plaintiffs paid a total of $3,854.67 on the note during its existence.

At the time of the purchase plaintiffs received a Jeep limited warranty covering the vehicle which provided that Jeep " * * * will pay for the repair or replacement of any part it supplies which proves defective in material or workmanship under normal use and service."

In November, 1978, plaintiffs took the Cherokee to Rodekopf Motors in Independence, Missouri, to have its wiring harness repaired, which was done under the warranty, Rodekopf stating that the harness had been pinched by the hood. Mr. Hibbs admitted that the wiring harness problem was not related to his present claim (for a fire caused by a

defective transmission) and he was making no claim that the wiring harness was any part of his damages.

In the first week of December, 1978, there was a transmission fire in the vehicle while Mrs. Hibbs was operating it. The vehicle was towed to Rodekopf Motors which fully disassembled the transmission. J. C. Deihl, Jeep's district service manager, was then present and was asked to examine the transmission fluid. He observed that it was dark gray in color and had an odor like "raw sewage". He did not know what caused the unusual look and smell of the fluid, and gave no instructions to Rodekopf as to how to work on the transmission. It was reassembled and the repair cost was paid by Jeep under the warranty, and Mr. Hibbs obtained it on December 15, 1978, after being advised by Rodekopf that the transmission repair had been completed. On the way home he noticed that the transmission was making noise,

throwing fluid out and that there was smoke coming from the engine compartment. He called Rodekopf and told them that "their brand new transmission didn't last", and he was advised that a tow truck would be sent on December 18 to rebuild the transmission. He told neither Rodekopf nor his wife, whom he subsequently called, that there was smoke coming from the engine compartment.

Mr. Hibbs then asked his daughter to move the vehicle and when she started it, the engine compartment burst into flames, which "burned clear on back under the Jeep." Mr. Hibbs called John T. Doudna, Jeep's owner relations manager, after the fire and told him that "his vehicle had quit pulling, was leaking fluid in his driveway and he wanted to know what I was going to do about it." The fire was not then mentioned. Doudna told him to contact the dealership and make arrangements to have the vehicle taken back so it could be looked at. On the Saturday

following the fire, Jeep's Mr. Deihl found out about the incident, and discussed it with Doudna the next Monday, then discovering that there were varied stories about what had happened. Doudna asked Deihl to perform a fire examination of the vehicle at Rodekopf's. On that day Mr. Hibbs again called Doudna and asked what he was going to do about his fire because he wanted his insurance company, which he had notified, to know of the outcome.

On December 19, 1978, Deihl inspected the vehicle for about one and one-half hours, finding the dipstick in place with no evidence that transimission fluid had been expelled, and no combustible wiring or other materials were present in the area of the most significant damage on the vehicle. He asked Doudna to look at it to get a second opinion, which Doudna did for more than an hour. There transmission fluid was found to be normal and there was no evidence of com-

bustion therein. He was convinced that the fire did not start around the transmission. The hottest point of the fire was on the driver's side, about a foot in front of the fire wall, where nothing combustible was located. If the fire had started on the passenger side as a result of the burping of the fluid, the heat would have destroyed the heater box, but it and the hoses were untouched. Doudna also observed that the upper radiator hose at the front of the engine was burned in two.

As a result of these examinations, Doudna and Deihl were unable to find any evidence of any mechanical or manufacturing defect that started the fire. Mr. Hibbs was so informed by Doudna, and it was suggested that he turn the matter over to his insurance company, which was declined. On February 23, 1979, plaintiffs' counsel notified Jeep that " * * * as of this date Mr. Gary Hibbs revokes the acceptance of said Cherokee Chief and demands

the refund of the purchase price of the vehicle. Said automobile is now in the possession of the Rodekopf dealership." The demand was rejected on the basis that there was no evidence of any defect as the cause of the fire of December 15, 1978. The filing of this suit followed.

At trial plaintiffs produced two mechanics as expert witnesses. Each of them thoroughly examined the vehicle on several occasions, at which time the dipstick was two or three inches up out of the filler tube, thus creating an umbrella-like effect which forced the transmission fluid to back down upon the hot manifold as it comes out of the filler tube. Both witnesses noted that the rubber seal in the cap of the dipstick was not there. One of the witnesses, Mott, gave his opinion that the fire started at the right rear manifold by the dipstick filler tube and then spread across the back fire wall along the wiring and wiring harness. The fire

started as a result of fluid "burping" out of the filler tube onto the manifold. A transmission in good working order does not permit fluid to come up out of the filler tube, and if it does, there has to be a defect in the transmission, which in this case was a blocked air vent.

The other witness, Cooper, also identified the starting point of the fire as being at the top of the transmission by the filler pipe, which he found to be rusted as a result of the fire. His opinion was also that the fire started as a result of the transmission "burping" fluid. Both witnesses testified that the defect identified was consistent with Mr. Hibbs' testimony about the noise it was making and the way it was acting prior to the fire. A transmission with this kind of problem would have heat building up inside it, causing the fluid to foam and develop pressure. The heat could be so extreme that the fluid could catch fire within the

transmission. With the transmission fluid being so hot and spraying onto the hot manifold, an engine fire is the natural result. Both witnesses found fluid oil on the right front part of the inner fender skirt, and a fireman, Zellmer, testified that he saw transmission fluid on the side of the transmissions.

Although the foregoing evidence of causation conflicted with that of Jeep, it was sufficient for the jury to find that a defect was present which gave rise to Jeep's duty to pay for repairs under its express limited warranty.

Upon the remaining Count I, against Jeep upon the theory of breach of the express warranty of repair or replacement of any part that fails due to a defect in material or workmanship under normal use and service, Jeep contends that it was error to include as an element of damages in Instruction No. 8 any consequential damages occasioned by the

breach. Instruction No. 8 submitted:

> "If you find in favor of plaintiffs, then you must award plaintiffs such sum as you believe was the difference between the fair market value of the 1979 Jeep Cherokee automobile when plaintiffs discovered or should have discovered it did not conform and its fair market value had it been as represented by defendants plus such sum as you believe will fairly and justly compensate plaintiffs for any other damage plaintiffs sustained as a direct result of the 1979 Jeep Cherokee automobile failing to conform.
>
> "The phrase 'fair market value' as used in this instruction means the price which the property in question would bring when offered for sale by one willing but not obliged to sell it, and when bought by one willing or desirous to purchase it but who is not compelled to do so." [Italics added.] The source of the instruction is stated to be MAI 16.02 and 4.17, as offered by plaintiffs.

Without doubt, under the facts of this case, if there had been evidence to support

them, plaintiffs would have been entitled to submit to the jury the issue of consequential damages. That is provided for in § 400.2-715 (2)(a) and (b), RSMo 1978. There is, of course, a limitation of the repair warranty here in these words, "What the Warranty doesn't cover ... * * * 'Loss of time, loss of use of the vehicle, inconvenience, consequential damage or other incidental expenses'", which is a valid limitation or exclusion under § 400.2-719(3), unless it is unconscionable. That limitation, however, is not applicable to this case for the reason that the limitation of recovery or exclusion from recovery in the express warranty is referable only to the matter of repair of the vehicle if Jeep had chosen to perform that warranty. Jeep, however, has disclaimed any duty to repair upon its asserted ground given to plaintiffs that there was no defect in the Jeep Cherokee. Under that evidence, Jeep's warranty of repair of the vehicle failed, and

plaintiffs would therefore be entitled to any other damages which their proof established. See the excellent article, "Failure of Essential Purpose and Essential Failure on Purpose: A Look at Section 2-719 of the Uniform Commercial Code", 31 Southwestern Law Journal 759, 768, quoting Moore v. Howard Pontiac-American, Inc., 492 S.W.2d 227, 229 (Tenn. Ct. App. 1972), "'In this case, though given the opportunity to comply with its warranty, appellant either could not or would not make the necessary repairs or parts replacement to give appellees that which they purchased-an automobile substantially free of material defects-thus freeing appellants (sic, appellees ?) to seek other relief.'" See the further discussion of clauses excluding liability for consequential damages at pages 772, et seq., of that article, and these further cases and authority: Volkswagen of America, Inc. v. Harrell, 431 So.2d 156 (Ala. 1983); Jacobs v. Rosemount

Dodge-Winnebago South, 310 N.W.2d 71 (Minn. 1981); Goddard v. General Motors Corp., 396 N.E.2d 761 (Ohio 1979); the discussion in Earl M. Jorgensen Co. v. Mark Construction, Inc., 540 P.2d 978, 986, et seq. (Hawaii 1975), and cases cited; Anno. 2 ALR 4th 576, 590, § 5[a]; and note especially § 400.2-719(2), "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter." See also in this connection, 58 Washington University Law Quarterly 317, "The Enforceability of Contractual Clauses Excluding Sellers from Liability for Consequential Damages under Section 2-719 of the Uniform Commercial Code."

Regardless of any right to receive consequential damages under the rationale of the foregoing authorities, the giving of Instruction No. 8 was error because there was no evidence to support the submission of that

element of damages. The argument to the jury by plaintiffs' counsel was this: "Now in regard to these damages, we have -- the Hibbs, as you know, bought the vehicle for Ninety-Two Hundred Dollars. The salvage value was Two Thousand Sixty-One which leaves damages there of $7,129.00. In addition to that there was some sales tax of $229.29." These figures compute to $7,368.29, which is $131.71 short of the $7,500 verdict returned by the jury. There is no evidence at all of this $131.71, which plaintiffs say was $128.00 short and which they urge could be cured by this court by remittitur. But the sales or use tax is not a damage occasioned by Jeep's breach of its warranty to repair. Rather, it is a tax imposed by the state of Missouri for the purchase price paid, less the allowance for a traded-in vehicle under Chapter 144, RSMo. 1978. Perhaps in a proper case these items which were improperly included in the amount of the verdict could

be deducted by way of remittitur, thus curing it. But there are not other facts indicating confusion of the jury. There was a stipulation of facts, entered into by the parties, which in part included a fact that the Bank of Independence, after taking possession of the vehicle, sold it for salvage for $2,067, which it applied to plaintiffs' loan balance. Over plaintiffs' objection, the stipulation was not admitted into evidence except for the paragraph as to salvage sale, but counsel for plaintiffs read to the jury only the portion, "In January, 1981, the 1979 Cherokee Jeep was sold at salvage for a net amount of $2,067.00." The jury was never informed as to how the salvage money was disposed, and certainly it was confused as that subject for it sent to the court the question, "Can we find out who got the salvage money?" The court responded, "I cannot answer your question. I can only refer you to testimony and argument of counsel during trial." There

is no way of knowing whether the jury did in fact take into consideration the salvage value in arriving at its verdict, and Jeep would be entitled to that deduction from the purchase price, which amount was obviously applied by the bank on plaintiffs' note balance to their benefit. Plaintiffs would be unjustly enriched at Jeep's expense if the jury did not in fact deduct the salvage value. There is also further confusion evident in the jury's consideration of damages. The record shows that it first returned verdict A (which was referable to the warranty instruction) for $20,000. The court rejected that verdict and sent the jury out to consider the verdicts anew. The jury then returned a new Verdict A crossing out the $20,000 figure and writing below it $7,500 and also returned a verdict for $12,500 actual damages on the fraud claim, with no punitive damages allowed. [The latter verdict is here conceded by plaintiffs to have

been improper under the evidence.]

The confusion, however, does not end with what has above been noted. Although Jeep does not, by a point of error, complain of the measure of damages portion of Instruction No. 8, the "before and after values", under the facts here that measure was in error for the reason that plaintiffs no longer had possession of the vehicle and their obligation to the bank had been discharged in full by its sale for salvage and application of insurance proceeds. Although § 400.2-714(2) does provide, "The measure of damages for breach of warranty is the difference in value at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted", it provides further, "unless special circumstances show proximate damages of a different amount." It is said in Givan v. Mack Truck, Inc., 569 S.W.2d 243, 248[8-13] (Mo. App. 1978), "The 'difference in values'

measure of damages of § 400.2-714 is inappropriate where plaintiffs no longer have the truck and the balance due on it has been forgiven." [This case is mentioned in the argument portion of Jeep's brief.] Here, in a similar situation, plaintiffs no longer had the Jeep Cherokee and the balance due on it at the bank had been paid in full from various sources. The matter of the proper measure of damages was further complicated by the testimony of Mrs. Hibbs, the co-owner of the vehicle. She told the jury that the purchase price of the automobile of around $9,200 on August 25, 1978 was its <u>then</u> reasonable market value. The transmission fire occurred on December 15, 1978. Then one of the mechanics who examined the vehicle some four months later testified that it then had a fair market value of from $1,800 to $2,000. The measure of damages should have been covered by MAI 4.01 rather than MAI 4.17, then plaintiffs could argue to the jury

their right to recovery of the purchase price (less the amount of the salvage) which is a remedy provided by the Magnuson-Moss Act, 15 USC § 2301, et seq., which gives to consumers a right of civil action against a warrantor for breach of the warranty, which under 15 USC § 2310(d)(1)A, is cognizable in any court of competent jurisdiction in any state. Under 15 USC §2304(a)(4), if the product contains a defect which is not remedied after a reasonable number of attempts, the warrantor must permit the consumer to elect a refund for the product. [In this case, Jeep was given the opportunity to remedy the transmission condition, but after inspection denied there was a defect, which the evidence here showed existed, thus giving rise to the alternative remedy of refund.] See also Miller v. Andy Burger Motors, Inc., 370 S.W.2d 654, 660[6] (Mo. App. 1963), a rescission case, similar to the revocation of acceptance and the demand for return of the

purchase price here, where the court said, " * * * [B]ut, if the contract is rescinded, the purchaser's damages, if any, are determined from the original amount paid or purchase price. (Citing cases and authority.)"

By reason of the numerous errors, and the uncertainty as to how the jury reached its verdict, this case does not lend itself to the expediency of remittitur, but it should be remanded for new trial on the issue of damages alone, including definite evidence as to the disposition of the salvage sale proceeds.

Jeep contends that the evidence of payment by plaintiffs' insurer for the fire damage should have been admitted, as included in the stipulation of facts, $4,206.69, which was paid to and applied by the Bank of Independence to the loan balance of Petitioners. Petitioners' objection to that part of the stipulation was that it was inad-

missible because it was payment from a collateral source. Jeep argues that the collateral source doctrine is applicable only to claims against tortfeasors, and not to warranty-contract actions such as this. The trial court properly ruled out of evidence the insurance payment. The doctrine does not apply only to claims against tortfeasors. See Wells v. Thomas W. Garland, Inc., 39 S.W.2d 409[7-8], 412 (Mo. App. 1931), a contract bailment case holding that the bailee, claiming mitigation of dangers by reason of the bailor's insurance on a coat, was a stranger to that contract, and the damages could not be mitigated to the extent of the insurance collected by the injured party. See also Erhart v. Wabash Ry. Co., 118 S.W. 657, 659, 136 Mo. App. 617 (1909). The premium on the policy here was paid by Petitioners and the policy had a loss payable to their lender. Jeep was a stranger to that insurance contract, which was not made for

its benefit. The trial court did not err in excluding that portion of the stipulation of facts.

Petitioners contend, by cross-appeal, that the trial court erred in denying them attorney fees under the Magnuson-Moss Act, 15 USC § 2310(d)(2). It is noted that Jeep had not established an informal dispute settlement procedure under 15 USC §2310(a)(2), and therefore plaintiffs had to bring their suit for damages on the written warranty in the Circuit Court under 15 USC §2310(d)(1). Paragraph (2) of this latter section provides, "If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on the actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the com-

mencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate." Obviously, upon a consideration of the facts, the trial court had the discretion to deem the requested award of attorneys' fees as inappropriate. The parties join issue on whether the trial court abused its discretion in denying plaintiffs their requested attorneys' fees. Jeep cites cases defining "abuse of discretion". A frequent definition is: "An abuse of discretion is an erroneous finding and judgment which is clearly contrary to the facts or the logical deductions from the facts and circumstances before the court - a judicial act which is untenable and clearly against reason and which works an injustice." State v. Stubenrouch, 499 S.W.2d 824, 826[4-6] (Mo. App. 1973). Beckman v. Beckman, 545 S.W.2d 300, 301 [1] (Mo. App. 1976); see also Thummel v. Thummel,

609 S.W.2d 175, 183[12,13] (Mo. App. 1980). There are state cases which have allowed attorneys' fees in actions for breach of warranty under the Magnuson-Moss Act, e.g., Champion Ford Sales, Inc. v. Levine, 433 A.2d 1218, 1227[9-10] (Md.App. 1981) [where the court remanded the case for a determination of the amount of attorney fees to be awarded, unless the court determined the award to be inappropriate.]; Nobility Homes, Inc. v. Ballentine, 386 So.2d 727 (Ala. 1980); Welch v. Fitzgerald-Hicks Dodge, Inc., 430 A.2d 144 (N.H. 1981); Massingale v. Northwest Cortez, Inc., 620 P.2d 1009 (Wash. App. 1980); and Ventura v. Ford Motor Corporation, 414 A.2d 611 (N.J.Sup. 1980), aff'd. 433 A.2d 801 (1981) [overruled on other grounds, 440 A.2d 1345 (N.J. 1982)]. At least one case holds that where a plaintiff was relieved of his obligation to pay a remaining portion of a purchase price as damages for breach of warranty of a jeep after revocation of its

acceptance, there was no abuse of discretion in disallowing attorney fees claimed under 15 USC § 2310. Trost v. Porreco Motors, Inc., 443 A.2d 1179 (Pa.Sup. 1981).

The plaintiffs' action in three counts, in their second amended petition, in addition to the Jeep Corporation, was brought against Pete Franklin Chrysler-Plymouth, Inc.; Galen Boyers Motors, Inc.; Bill Rodekopf AMC Jeep & Vans Corporation; Pete Franklin AMC Jeep, Inc; and Bank of Independence. These additional defendants were dismissed at various stages, and the final submission on the grounds of breach of warranty and for fraud was against Jeep only. Plaintiffs' counsel tendered to the trial court an itemized list of subject matter and hours spent on the case, which counsel testified was taken from time records kept in his office. The list shows obviously that much of the time spent was on the claims against defendants other than Jeep. It does not show with any clarity

what portion of the time was spent on the case against Jeep, what lawyers (whether a lawyer, law clerk, or senior partner) worked on the case, and their specific charges made. The hours are totalled for attorneys: office, 400.40; trial 40.00; total, 440.40; law clerk hours, 168.50; additional attorney hours and law clerk hours since filing motion for attorney fees, 28.75 and 9.50 respectively. It was testified by counsel that law clerk hours were charged at the rate of $35.00 per hour; preparation of pleadings, research and appearance on motions, $65.00 per hour; and for trial time, $85.00 an hour as a minimum amount. The total amount of attorney fees requested was $37,524.75, which was denied by the court. There was also requested a total of $1,754.94 for the expenses incurred by plaintiffs, which was not ruled by the court. Plaintiffs' counsel had advised them that his attorneys' fees would be in a reasonable amount.

Plaintiffs contend further that the trial court erred in not giving reasons as to why an award of attorneys' fees would be inappropriate in this case, i.e. the "special circumstances" which would render the award unjust. No request for findings of facts and conclusions of law were made to the court on this issue and therefore the trial court cannot be convicted of error in denying attorney fees without giving reasons. Rule 73.01; Walker v. Walker, 631 S.W.2d 68 (Mo. App. 1982); Watkins v. Johnson, 606 S.W.2d 493 (Mo. App. 1980).

Under all of the circumstances, this court cannot find any abuse of discretion, under the above definition thereof, in the trial court's denial of attorney fees, and plaintiffs' request for a remand for determination thereof is overruled.

Other questions raised by Jeep do not relate to the issue of damages, and need not, therefore, be considered.

The judgment of $12,500 on the fraud count is reversed. The judgment of $7,500 on the warranty count is reversed, and the case is remanded thereon for new trial on the issue of damages only, including a consideration of plaintiffs' claim for expenses, other than attorney fees, incurred as they may under the evidence be referable in nature and amount to the claim of plaintiffs against The Jeep Corporation alone.

All concur.

Jack P. Pritchard, Judge

APPENDIX C

IMPORTANT NOTICE

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DATE: February 28, 1984
IN RE: Hibbs, et al Vs. Jeep Corp.

WD# 34191

AND Appellant
Respondent Motion for rehearing overruled.
Transfer to Supreme Court denied. See Rule 83.03.

cc: David Whipple, George Coughlin

Peggy J. Stevens, Clerk

#12

APPENDIX D

NO. 65820

IN THE SUPREME COURT OF MISSOURI
WD #34191
January Session 1984

Gary L. Hibbs and Theresa Hibbs,

Respondents-Appellants,

vs. TRANSFER

Jeep Corporation,

Appellant-Respondent.

Now at this day, on consideration of respondents-appellants' Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI-SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that

the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1984, and on the 16th day of April 1984, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 16th day of April, 1984.

/s/ Thomas Simon Clerk .

D.C.

APPENDIX E

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
LIBERTY, MISSOURI

GARY L. HIBBS and THERESA E. HIBBS 4719 N.E. 46th Kansas City, MO Plaintiffs	)	
v.	)	Case No.CV179-815CC
THE JEEP CORPORATION, et al., 14250 Plymouth Road Detroit, MI 48232, Defendants	)	

THIRD AMENDED PETITION FOR DAMAGES

COUNT III

COME NOW the plaintiffs, Gary L. Hibbs and Theresa E. Hibbs, and for Count III of their cause of action against the defendants Jeep Corporation, Pete Franklin Chrysler-Plymouth, Inc., Bill Rodekopf AMC Jeep & Vans Corporation, and Pete Franklin AMC Jeep, Inc., allege and state to the Court:

1. That plaintiffs herein adopt and incorporate all of the allegations of Paragraphs 1 through 19 of Count I of their Third Amended Petition for Damages as through more fully set forth heren.

2. That this cause of action arises under 15 U.S.C. §2301 et. seq., commonly known as the Magnuson-Moss Waranty--Federal Trade Commission Improvement Act (hereinafter referred to as "the Act").

3. That defendants are in violation of the Act and the regulations promulgated pursuant thereto in the following respects:

(a) Defendants have failed to comply with the obligations of their written warranty as set forth in Count I hereof;

(b) Defendants have failed to comply with the obligations of their implied warranty as set forth in Count II hereof;

(c) Defendants have failed to fully

and conspicuously disclose in simple and readily understood language the terms and conditions of the written warranty in violation of 15 U.S.C. §2302(a);

(d) Defendants have failed to make available to plaintiffs the terms of their written warranty prior to the sale of the automobile in vilation [sic] of 25 U.S.C. §2302(b);

(e) Defendants have failed to remedy the defects, malfunctions and/or failure to conform with their written warranty, as hereinbefore stated, within a reasonable time, in violation of 15 U.S.C. §2304(a) (1);

(f) Defendants have purported to impose a limitation on the duration of any implied warranty with respect to the automobile in violation of 15 U.S.C. §2304(a)(2);

(g) Defendants have purported

to exclude or limit consequential damages for a breach of their written warranty and implied warranties with respect to the automobile in violation of 15 U.S.C. §2304(a)(3);

(h) Defendants have failed to permit plaintiffs to elect a refund for the automobile in violation of 15 U.S.C. §2304(a)(4);

(i) Defendants have purported to disclaim or modify the implied warranties to plaintiffs with respect to the automobile in violation of 15 U.S.C. §2308. . . .

. . .

WHEREFORE, plaintiffs, Gary L. Hibbs and Theresa E. Hibbs, claim the following damages as and against defendants Jeep Corporation, Pete Franklin Chrysler-Plymouth, Inc., Bill Rodekopf AMC Jeep & Vans Corporation and Pete Franklin AMC Jeep, Inc.: . . .

. . .

4. Interest, costs, expenses and reasonable attorneys fees as provided for by 15 U.S.C. §2310(d)(2) . . .

WHIPPLE, EISLER & KRAFT,
A Professional Corporation

By /s/ C. David Whipple
C. DAVID WHIPPLE -
No.15216
1111 Grand, Suite 300
Kansas City, MO 64106
(816) 842-6411

ATTORNEYS FOR PLAINTIFFS

IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

GARY L. HIBBS AND THERESA E. HIBBS, RESPONDENTS,	)	
VS.	)	WD No. 34191
JEEP CORPORATION, APPELLANT.	)	

IN THE CLAY COUNTY CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT, DIVISION THREE
HONORABLE STEPHEN R. PRATT, JUDGE

GARY L. HIBBS AND THERESA E. HIBBS, PLAINTIFFS,	)	
VS.	)	NO. CV179-815CC
JEEP CORPORATION, ET AL DEFENDANTS.	)	

TRANSCRIPT

VOL. 2, P. 467 . . .

WEDNESDAY, AUGUST 25, 1982

PLAINTIFFS' MOTION FOR ATTORNEY FEES

MR. C. DAVID WHIPPLE: WE WILL PUT A WITNESS ON IT A MINUTE. YOU WILL REMEMBER, OF COURSE, WE HAVE FILED A MOTION FOR ATTORNEY FEES AND CALLED IT UP FOR TODAY. AT THE TRIAL BEFORE THE JURY IT WAS AGREED THE ISSUE OF ATTORNEY FEES WOULD BE BIFURCATED AND WE ARE HAVING THIS HEARING AT THIS TIME.

THE COURT: I UNDERSTAND THAT YOU ARE TAKING THIS UP UNDER THE MAGNUSON-MOSS ACT.

MR. C. DAVID WHIPPLE: MAGNUSON-MOSS ACT. YES, SIR. . . .

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MR. C. DAVID WHIPPLE: WE DON'T HAVE ANY FURTHER EVIDENCE. OF COURSE, WE FILED OUR SUGGESTIONS WHICH DETAIL WHAT WE BELIEVE THE LAW CLEARLY IS IN REGARD TO THE RECOVERY OF ATTORNEY FEES. GEORGE HAS FILED COUNTER-SUGGESTIONS. I DON'T KNOW IF YOU WANT ANY ARGUMENT ON THAT AT THIS TIME OR WHETHER YOU WOULD PREFER TO JUST LOOK AT THE SUGGESTIONS.

THE COURT: I'LL LOOK AT THE SUGGESTIONS UNLESS YOU--IF ANYBODY WANTS TO MAKE ANY ARGUMENT, FEEL FREE TO DO SO. I'M NOT RESTRICTING YOU TO IT. IF YOU WANT TO SUBMIT IT ON YOUR SUGGESTIONS, WELL AND GOOD. IF YOU HAVE SOMETHING ADDITIONAL TO SAY ABOUT IT, I'LL BE GLAD TO LISTEN TO IT. . . .

(Argument by Mr. Coughlin)

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MR. DAVID W. WHIPPLE: YOUR HONOR, JUST QUICK IN RESPONSE, WE'D LIKE TO SUBMIT THAT UNDER MAGNUSON-MOSS ACT WHICH WE FILED A COUNT UNDER, THERE IS NO EXPLICIT REQUIREMENT THAT THERE HAS TO BE EVIDENCE PRESENTED TO ESTABLISH EXPLICIT VIOLATION OF THE VARIOUS ASPECTS OF THE MAGNUSON-MOSS ACT. SECTION 2310 PROVIDES, AND I THINK THIS IS REALLY THE KEY TO OUR CLAIM FOR ATTORNEY FEES, IT READS, SUBSECTION D(1) SAYS, SUBJECT TO SUBSECTIONS A(3) AND E OF THIS SECTION, A CONSUMER WHO IS DAMAGED BY THE FAILURE OF A SUPPLIER,

WARRANTOR OR SERVICE CONTRACTOR TO COMPLY WITH ANY OBLIGATION UNDER THIS CHAPTER--AND THIS IS THE IMPORTANT PART--OR UNDER ANY WRITTEN WARRANTY, IMPLIED WARRANTY OR SERVICE CONTRACT, MAY BRING SUIT FOR DAMAGES AND OTHER LEGAL AND EQUITABLE RELIEF IN ANY COURT OF A COMPETENT JURISDICTION IN ANY STATE OR DISTRICT OF COLUMBIA.

WE SUBMIT THE LANGUAGE OF THAT SECTION EXPLICITLY STATES THAT AN ACTION MAY BE BROUGHT UNDER ANY WRITTEN WARRANTY. IT DOES NOT LIMIT IT SIMPLY TO PROVIDING FOR THE VIOLATIONS OF WHICH THE ACT SETS FORTH FOR IN THE PREVIOUS SUBSECTION, BUT IT ALSO PROVIDES FOR ANY WRITTEN WARRANTY AS WELL.

. . .

P.483 . . .

. . . AND SO WE FEEL THAT WITH THIS FEDERAL STATUTE THAT SPECIFICALLY APPLIES FOR ATTORNEY FEES, WE WILL BE

ENTITLED TO ATTORNEY FEES. AND THE UNITED STATES CONGRESS HAS SPOKEN IN THIS--IN THIS PROVISION AND SO REGARDLESS OF ANY--ANY STATE LAW TO THE CONTRARY, THE FEDERAL LAW OVERRIDES. AND I'M SURE, YOU KNOW, IF YOU WERE TO EXAMINE THE LEGISLATIVE HISTORY BEHIND THE MAGNUSON-MOSS ACT, THAT IT WAS SPECIFICALLY DESIGNED TO ALLOW CONSUMERS--IN THIS PARTICULAR--IN FACT THE SITUATION EXACTLY WHAT WE'VE GOT HERE, TO PROVIDE THE FINANCIAL RESOURCES TO BE ABLE TO RECOVER FOR BREACH OF WARRANTY BECAUSE IF THEY HAVE THESE--DID NOT HAVE THIS REMEDY AVAILABLE TO THEM, THEY WOULD NOT BE ABLE TO PROPERLY PURSUE THEIR LEGAL REMEDIES WHICH THEY ARE FULLY ENTITLED TO.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

GARY L. HIBBS	)	
and	)	
THERESA HIBBS,	)	
Respondents and	)	
Cross-Appellants,	)	
	)	
v.	)	WD 34191
	)	
JEEP CORPORATION,	)	
Appellant.	)	

MOTION FOR REHEARING AND/OR
FOR TRANSFER TO THE MISSOURI SUPREME COURT

Gary L. Hibbs and Theresa Hibbs, Respondents Cross-Appellants, respectfully move the Court for a rehearing in the above-cause and/or transfer of said cause to the Supreme Court on the following grounds:

1. The Court, by holding that the trial court did not abuse its discretion in failing to award plaintiffs their attorney fees, is in conflict with the statutory intent and language of the Magnuson-Moss Act, 15 U.S.C. §2301 et seq. (SUPP. 1979) and more specif-

ically 2310(d).

2. The Court in holding that the trial court did not err in not giving reasons as to why an award of attorney fees was inappropriate, is in conflict with the Magnuson-Moss Attorney Fee provision and the Federal Courts' interpretation of Attorney Fee Federal Statutes.

3. The Court erred in not finding that the trial court abused its discretion under the State Law and Court Decisions.

4. The Court in its opinion misinterpreted the facts and law surrounding the claim for attorney fees against Jeep Corporation by finding that no award was appropriate due to time spent on defendants other than Jeep.

5. The Court has overlooked and failed to address the issue as to attorney fees on this Appeal and the attorney fees for retrying this case.

6. The Respondents-Cross-Appellants,

Gary L. Hibbs and Theresa Hibbs respectfully move the Court if the Motion for a Rehearing is denied to transfer this case to the Supreme Court for the following reasons:

(a) The question involved in this case is of such general interest or importance that the final decision thereon should be made by the Supreme Court.

(b) The decision of this Court is in conflict with the decisions set forth in other jurisdictions regarding the intent of the Magnuson-Moss Act concerning attorney fees, and this point should be re-examined.

(c) The decision of this Court is in conflict with Federal decisions in attorney fee cases in which an allowance of fees is presumed and an explanation of the trial court's reasons for denial is required.

WHEREFORE, Respondents-Cross-Appellants,

Gary L. Hibbs and Theresa Hibbs respectfully request this Court to grant them a rehearing in this case or in the alternative, to transfer the cause to the Missouri Supreme Court.

Respectfully submitted,

WHIPPLE & KRAFT, P.C.

By: /s/ C. David Whipple
C. DAVID WHIPPLE #15216

By: /s/ David W. Whipple
DAVID W. WHIPPPLE #29102

1111 Grand Avenue, Suite 200
Kansas City, MO 64106
Telephone:(816) 842-6411

ATTORNEYS FOR RESPONDENTS-
CROSS-APPELLANTS

I hereby certify that
a copy of the above and
foregoing was mailed this
17 day of January, 1984, to:

George P. Coughlin, Esq.
Sarah W. Hays, Esq.
GAGE & TUCKER
2345 Grand Avenue
P. O. Box 23428
Kansas City, MO 64141

By: /s/ C. David Whipple
C. DAVID WHIPPLE

IN THE SUPREME COURT OF MISSOURI

DUPLICATE
OF FILING ON
MARCH 12 1984
IN OFFICE OF
CLERK SUPREME
COURT

GARY L. HIBBS and THERESA HIBBS, Respondents & Cross-Appellants	)	
v.	)	Case No._____
JEEP CORPORATION, Appellant.	)	

RESPONDENTS-CROSS-APPELLANTS' APPLICATION TO TRANSFER FROM COURT OF APPEALS TO THE SUPREME COURT AFTER OPINION ON ORDER OF SUPREME COURT

COME NOW the Respondents/Cross-Appellants in the above-entitled case, and move, pursuant to Rule 83.03 of the Missouri Rules of Civil Procedure, that the Supreme Court order this case transferred to it, and in support thereof, state:

1. This application for transfer arises from a denial of attorney fees under the

Magnuson-Moss Act, 15 U.S.C. §2301 et seq. (Supp. 1979), by the Circuit Court of Clay County, Missouri after plaintiffs had been the prevailing parties in an action against defendant Jeep Corporation for breach of warranty.

2. The decision of the Circuit Court of Clay County was appealed to the Missouri Court of Appeals, Western District by both the plaintiffs and defendant.

3. The opinion in the case was filed in the Court of Appeals on the 3rd day of January, 1984.

4. On the 28th day of February, 1984, the Court of Appeals overruled Respondent/Cross-Appellants' Motion for Re-Hearing.

5. On the 28th day of February, 1984, the Court of Appeals denied Respondent/Cross-Appellants' Application for Transfer under Rule 83.02 to this Court.

6. This case should be transferred to

this Court because of the general interest and importance of the question involved in this case with regard to a circuit court's refusal to award attorney fees pursuant to Section 2310(d) of the Magnuson-Moss Act, 15 U.S.C. Section 2301 et seq. (Supp. 1979) The opinion of the Court of Appeals in this case sets forth no guidelines in this area of attorney fees and, therefore, the status of Magnuson-Moss attorney fee awards in Missouri needs clarification by this Court. To the undersigned's best knowledge there has been no Missouri Supreme Court decision interpreting the Magnuson-Moss Attorney Fee Provision.

7. This case should be transferred to this Court for the purposes of reexamining the decision in the Court of Appeals which is in conflict with decisions set forth in other jurisdictions regarding the intent of the Magnuson-Moss Act provision for attorney fee awards.

8. The case should be transferred to this Court for the reason that the opinion filed in the Court of Appeals is contrary to federal decisions in attorney fee cases in which an allowance of fees is presumed and an explanation of the court's reasons for denial of fees is required.

WHEREFORE, Respondents/Cross-Appellants pray for an Order to the Court of Appeals, Western District, for a transfer of this case to the Supreme Court for consideration.

Respectfully submitted,

WHIPPLE & KRAFT, P.C.

By: /s/ C. David Whipple
C. DAVID WHPPLE #15216

By: /s/ David W. Whipple
DAVID W. WHIPPLE #29102

1111 Grand, Suite 200
Kansas City, MO 64106
(816) 842-6411

ATTORNEYS FOR RESPONDENTS/
CROSS-APPELLANTS